

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

**In case ECS-26/24, the Secretariat of the Energy Community
against**

Kosovo*¹,

the

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Nikola Radovanovic, Helmut Schmitt von Sydow, Verica Trstenjak and
Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 19 July 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-26/24 against Kosovo*. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Kosovo* **by failing to bring into force the laws, regulations and administrative provisions** necessary to comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of **Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources**², as adapted and adopted by Ministerial Council Decision 2021/14/MC-EnC and amended by Ministerial Council Decision 2022/02/MC-EnC, and **by failing to forthwith notify those measures to the Secretariat** by 31 December 2022, **fails to comply** with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Articles 2(1) and (2) of Ministerial Council Decision 2021/14/MC-EnC.

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

² Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, 21.12.2018, p. 82–209.

Pursuant to Article 32 (4) Dispute Settlement Rules 2022 the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Energy Community Advisory Committee as amended (RoP) a public hearing shall take place unless both parties to the case agree that it can be dispensed with. On 22 July 2024 the Advisory Committee asked the parties whether they consider holding a public hearing necessary. In its e-mail of 23 July 2024 the Secretariat stated that there is no need for a hearing, the Contracting Party made no declaration concerning the hearing. Therefore, the Advisory Committee assumed that a hearing was not necessary and informed the parties that a hearing can be dispensed with in this case.

II. Provisions allegedly violated by the Contracting Party concerned

Article 6 of the Treaty reads:

The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 20 of the Treaty reads:

Each Contracting Party shall implement Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

Article 25 Directive (EU) 2018/2001 provides for the *Mainstreaming renewable energy in the transport sector.*

Article 26 Directive (EU) 2018/2001 provides for *Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops.*

Article 27 Directive (EU) 2018/2001 provides for *Calculation rules with regard to the minimum shares of renewable energy in the transport sector.*

Article 29 Directive (EU) 2018/2001 provides for the *Sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels.*

Article 30 Directive (EU) 2018/2001 provides for the *Verification of compliance with the sustainability and greenhouse gas emissions saving criteria.*

Article 31 Directive (EU) 2018/2001 provides for the *Calculation of the greenhouse gas impact of biofuels, bioliquids and biomass fuels.*

Article 2 of Ministerial Council Decision 2021/14/MC-EnC reads:

1) Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2018/2001, Directive (EU) 2012/27/EU as amended by Directive (EU) 2018/2002, Regulation (EU) 2018/1999 [...] as adapted by this Decision, by 31 December 2022.

[...]

2) Upon transposition, Contracting Parties shall immediately inform the Energy Community Secretariat thereof and communicate to the Energy Community Secretariat the text of the provisions of national law, which they adopt in the field covered by this Decision.

Article 89 of the Treaty reads:

The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

Article 11(3) of the Dispute Settlement Rules reads:

Where the Secretariat initiates a dispute settlement procedure on the grounds that a Party has failed to fulfil its obligation to notify measures transposing a Decision addressed to it within the deadline specified in that Decision, the Secretariat shall submit a reasoned request to the Ministerial Council without preliminary procedure.

III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The Reasoned Request of the Secretariat alleges that by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of Directive (EU) 2018/2001 and to inform the Secretariat thereof within the deadline specified in the Ministerial Council Decision, i.e. by 31 December 2022 pursuant to Article 2(1) of Ministerial Council Decision 2021/14/MC-EnC Kosovo* failed to comply with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Articles 2(1) and (2) of Ministerial Council Decision 2021/14/MC-EnC.

In its reply to the Reasoned Request of 17 September 2024 Kosovo* refers to the Law No. 08/L-258 on the Promotion of the Use of Renewable Energy Sources, published in the Official Gazette No. 7 / 2 May 2024, and to draft legislation which is not adopted yet.

In the light of this reply Kosovo* and the Secretariat were invited to inform the Advisory Committee whether they consider these legislative measures as an implementation of Directive (EU) 2018/2001 and – if so – to specify which of the in the Reasoned Request quoted Articles [Article 25(1), (2), Article 26, Article 27, Article 28, Article 29, Article 30, and Article 31(1), (2)] are implemented.

On 27 September 2024 the Secretariat replies and states:

“In the reply from Kosovo dated 21 June 2024, the only legislative measure actually adopted that is relied upon by Kosovo is Law No. 08/L-258 on the Promotion of the Use of Renewable Energy Sources, published in the Official Gazette No. 7 / 2 May 2024. All of the other legislative measures cited in the reply are only “drafts”. As detailed in the Reasoned request (paragraph 23), draft legislation which is not yet adopted, has not yet entered into force, and thus does not have any legal effect, cannot be considered as sufficient measures to transpose a Directive.

Regarding Law No. 08/L-258 on the Promotion of the Use of Renewable Energy Sources:

Article 25(1) of Directive (EU) 2018/2001 expressly requires that each Contracting Party shall set an obligation “on fuel suppliers” in order to achieve the applicable minimum share for renewable energy within the final consumption of energy in the transport sector by 2030. The legislative measure relied upon by Kosovo does not set any such obligation on fuel suppliers.

The share provided in Article 25(1) of Directive (EU) 2018/2001 of Directive shall be ‘calculated in accordance with the methodology set out in this Article and in Articles 26 and 27’. Article 26 of RED II

provides for 'specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops'. Article 27 of RED II provides for 'Calculation rules with regard to the minimum shares of renewable energy in the transport sector'. Article 29 of RED II provides for the 'Sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels'. Article 30 of RED II provides for the 'Verification of compliance with the sustainability and greenhouse gas emissions saving criteria'. Article 31 of RED II provides for the 'Calculation of the greenhouse gas impact of biofuels, bioliquids and biomass fuels'.

Chapter IX of Law No. 08/L-258 on the Promotion of the Use of Renewable Energy Sources, entitled 'SUSTAINABILITY AND GREENHOUSE GAS EMISSION SAVING CRITERIA FOR BIOFUELS, BIOLIQUIDS AND BIOMASS FUELS' addresses these requirements only in a summary and incomplete manner, providing further that 'Sustainability and the greenhouse gas emissions saving criteria referred to in paragraph 1. of this Article shall be laid down in secondary legislation adopted by the Ministry responsible for environment' (paragraph 2 of Article 45) and 'The Government, based on the proposal of the Ministry, shall adopt secondary legislation for calculating the greenhouse gas impact of Biofuels, Bioliquids and Biomass fuels and their fossil fuel comparators.' (Article 47) Kosovo has not submitted any such secondary legislation to the Secretariat.

Hence, the Secretariat maintains its Reasoned Request in Case ECS-26/24."

The Contracting Party replied on 3 October 2024, again referring to Law No. 08/L-258 on the Promotion of the Use of Renewable Energy Sources and attaching an English translation to the reply.³ As regards the implementation of the articles referred to in Chapter II, Kosovo* refers to the relevant provisions of this Law transposing the directive.

Even though Kosovo* refers to national provisions corresponding to Articles 25 - 27 and 29 - 31 of Directive (EU) 2018/2001, the Advisory Committee finds that the Reasoned Request is well-founded:

Art 1 (2) of the Law states:

"This Law partially transposes the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, as adopted by the Decision (2021/14/MC-EnC) of the Ministerial Council of the Energy Community."

Although the Law *partially* transposes Directive (EU) 2018/2001, it does not foresee specific rules to implement Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of this Directive. The Law mainly sets principles and policy objectives for Renewable Energy by defining tasks and functions of the stakeholders concerning the support of Renewable Energy, but refers to the further implementation by state authorities.

Art 5 (2) of the Law states:

"The policies in the area of Renewable Energy shall be implemented by the Government, the Ministry, the Regulator, as well as by other entities, as identified in the respective provisions of this Law and other laws regulating the energy sector in the Republic of Kosovo, and sub-legal acts issued pursuant to these Laws."

In its reply to the Reasoned Request of 17 September 2024 Kosovo* itself refers to draft legislation and administrative acts in order to implement the Law on the Promotion of the Use of Renewable Energy Sources.

Therefore, based on the available documentation, the Advisory Committee finds that the Reasoned Request is well-founded.

³ Also available on the website of the Assembly of the Republic of Kosovo*: https://kuvendikosoves.org/Uploads/Data/Documents/Lawno.08-L-258_kjtMLR3UBP.pdf

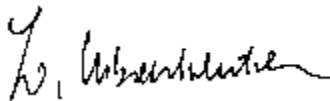
IV. Conclusions

The Advisory Committee considers that

Kosovo*, by failing to bring into force the laws, regulations and administrative provisions necessary to **comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of Directive (EU) 2018/2001** on the promotion of the use of energy from renewable sources as adapted and adopted by the Ministerial Council Decision 2021/14/MC-EnC and amended by the Ministerial Council Decision 2022/02/MC-EnC, and by failing to forthwith notify those measures to the Secretariat, **failed to comply** with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Article 2(1) and (2) of the Ministerial Council Decision 2021/14/MC-EnC.

Done in Vienna on 19 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President